Supreme Court, U.S.
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# In The
# Supreme Court of the United States

DAVITA CARTER, a minor, by her parents and next friends,

*Petitioner,*

v.

THE UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether, under the Federal Tort Claims Act, a federal court with jurisdiction to decide a claim should be considered a forum court of the state in which the court sits, or a federal forum, for purposes of applying the rules of the state of the wrong, when there is a conflict between the laws of the state where the injured party resides and the court sits, and the laws of the state where the act or omission causing the injury occurred.

II. Whether a federal court sitting in Illinois, applying Maryland's public policy exception to the application of *lex loci delicti*, can refuse to apply Maryland's statutory limitation on noneconomic damages, where the application of the Maryland statute would violate the rights guaranteed to every Illinois citizen, and where no Maryland public policy would be served by the application of Maryland law.

III. Whether the United States' failure to plead any affirmative defense to plaintiff's action should cause a waiver or estoppel and preclude the United States from securing the advantage of a statutory limitation on damages.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Davita Carter, respectfully prays this Court for a writ of certiorari to be issued to the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit that gives rise to this petition is reported at 333 F.3d 791, and is reprinted in the Appendix hereto. App. A-1. The opinion of the district court was not published. The lower court's Findings of Fact and Conclusions of Law filed on January 16, 2002, is reprinted in the Appendix hereto. App. B-1.

## JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its decision on June 24, 2003. An application for extension of time within which to file a petition for a writ of certiorari in this case was presented to Justice Stevens, who on September 11, 2003, extended the time to and including November 21, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Illinois Constitution, Article I, § 12

> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property, or reputation. He

> shall obtain justice by law, freely, completely, and promptly.

Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting with the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Federal Tort Claims Act, 28 U.S.C. § 1402(b):

> Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

Md. Code Ann. Cts. and J. Proc. § 11-108(b), 2(i)(ii) (1997):

> (i) Except as provided in paragraph (3)(ii) of this subsection, in any action for damages for personal injury or wrongful death in which the cause of action arises on or after October 1, 1994, an award for noneconomic damages may not exceed $500,000.

> (ii) The limitation on noneconomic damages provided under subparagraph (i) of this paragraph shall increase by $15,000 on October 1 of each year beginning on October 1, 1995. The increased amount shall apply to causes of action arising between October 1 of that year and September 30 of the following year, inclusive.

Fed. R. Civ. P. 8(c):

> Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

## STATEMENT OF THE CASE

### Statement of the Facts.

Petitioner, Davita Carter ("Davita"), is the daughter of David and Sheena Carter. David Carter served on active duty in the Marine Corps for twenty years. Davita Carter was, and is, a resident and citizen of Illinois.

When Davita was eleven years old, physicians employed by the United States at the Naval Hospital Great

Lakes, Illinois, diagnosed her with idiopathic scoliosis and told the Carters that Davita would need to undergo spinal fusion surgery. The United States, under the military's CHAMPUS medical program (hereinafter "CHAMPUS"), provided certain medical assistance to Davita, as a dependent of retired members of military personnel.[1] Under CHAMPUS' regulations, physicians employed by the United States are required to inform beneficiaries that if there is no military facility available near the beneficiary's home, the beneficiary may elect to have her surgery performed, with CHAMPUS funding, at a civilian medical hospital in her home state. Davita's physicians never informed the Carters of Davita's option to stay in Illinois for her surgery. On December 17, 1997, Naval Hospital Great Lakes transported Davita to the National Naval Center in Bethesda, Maryland.

Davita, who had no prior connection with Maryland, was rendered a permanent paraplegic during the surgery as a proximate result of the medical negligence of the physicians employed by the United States. Davita will be wheelchair bound for the rest of her life and does, and will suffer, from neurogenic bowel and bladder. Davita's post-operative care was life-threatening. The complications prompted the United States' physicians in Maryland to transfer Davita to Walter Reed Hospital in Washington, D.C. for further care. After Davita was stabilized, the United States transferred Davita to the Rehabilitation Institute of Chicago in Illinois, where she underwent physical therapy.

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[1] CHAMPUS also has an HMO-type counterpart called TRICARE and the military has been moving beneficiaries to various TRICARE programs since before Davita's surgery.

Davita continues to suffer physical pain, including muscle spasticity and febrile urinary tract infections, as well as mental pain and anguish. Davita's life expectancy was not changed by the negligent surgery, and as such, she will suffer the consequences of the surgery for 65 years.

**1. The District Court Proceedings.**

Davita filed her suit for medical malpractice against the United States in Illinois, her state of residence. The United States District Court for the Central District of Illinois had jurisdiction to hear Davita's lawsuit pursuant to Section 1402(b) of the Federal Tort Claims Act ("FTCA"). 28 U.S.C. § 1402(b).

After discovery closed, Davita filed a motion for summary judgment on liability. The district court granted summary judgment in favor of Davita, finding that the undisputed evidence established that the medical malpractice of the United States caused Davita's permanent injuries. App. B., p. 12. The bench trial on damages proceeded, and the district court found that Davita had suffered, and will suffer in the future, $8,000,000 for her permanent disability, $2,000,000 for her permanent disfigurement, $500,000 for her physical pain and suffering, $3,000,000 for her mental and emotional pain and suffering, and $2,000,000 for the loss of enjoyment of life as a result of the negligence of the United States' physicians. App. B, pp. 15-16.

The United States never pled any limitation on damages as an affirmative defense to Davita's FTCA lawsuit. Despite that fact, in the lower court's Finding of Fact and Conclusions of Law, the court reduced Davita's recovery of noneconomic damages by nearly 15,000,000

dollars. App. A, p. 2. The court did so by applying a Maryland statutory limitation on the recovery of non-economic damages which had been enacted by Maryland's legislature. The district court concluded that the limitation on damages was not required to be pled and that there was no sufficiently strong Illinois public policy to require the application of Maryland's choice of law public policy exception.

When Davita protested to the district court that Maryland's limitation on noneconomic damages was an affirmative defense which should have been pled under Rule 8(c) of the Federal Rules of Civil Procedure or considered waived, the court held that the limitation was not an affirmative defense. As such, the district court refused to revisit its reduction of Davita's damage award.

### 2. The Proceedings in the Court of Appeals for the Seventh Circuit.

On appeal, the Court of Appeals for the Seventh Circuit affirmed the district court's ruling on grounds which differed, in many respects, from the lower court's reasoning.

On the issue of whether Maryland's statutory limitation on noneconomic damages should apply to reduce Davita's damage award, the Seventh Circuit did not comment on the lower court's assessment of the strength of Illinois' public policy against limitations on the recovery of noneconomic damages. Rather, the Seventh Circuit affirmed the district court's conclusion by holding that a federal court sitting in Illinois, with jurisdiction to hear an FTCA lawsuit, is not a "forum state" for purposes of

determining state conflict of law issues, such as that presented in Davita's case. App. A, pp. 4-5.

The conflict of law issue, which so greatly reduced Davita's recovery in this case, arose because the law of Illinois, the law of the state where the federal court hearing Davita's action sits and Davita resides, differs radically from the law of Maryland, the place where the wrongful act occurred. Illinois' highest court has held that statutory limitations on noneconomic damages are arbitrary and unconstitutional and, as such, may not be applied to Illinois' citizens. On the other hand, Maryland's intermediary courts have consistently rejected the argument that its limitation on noneconomic damages is not permitted under Maryland's constitution and has allowed Maryland's legislature to enact such a limitation for the purpose of protecting Maryland's citizens from rising medical malpractice insurance premiums.

In Davita's FTCA case, the Seventh Circuit ruled that, even if the application of Maryland's conflict of law rules would apply Illinois law to the issue of the proper measure of Davita's remedy, the federal court must apply federal procedural rules. App. A, p. 5. The court then held that under federal procedural rules, federal rules would set the measure of damages in an FTCA lawsuit. *Id.* The court reasoned that a court hearing an FTCA action must be considered a federal forum, not a state forum, and that federal procedural rules would always consider a state's cap on damages to be procedural, "regardless of the source of the substantive rules in the case." App. A, p. 5. As such, the Seventh Circuit concluded that, even if Maryland's conflict of law rules would classify Maryland's limitation as procedural (thus applying Illinois law), or would otherwise direct the court to look to Illinois law to determine

whether to apply the limitation, Maryland's classification would never be binding on a federal court. *Id.* at 5.

The Seventh Circuit also dismissed the applicability of Maryland's public policy exception to the application of Maryland's *lex loci delicti* choice of law rule, applying a reason not relied upon by the lower court. The Seventh Circuit, without commenting upon the strength issue of Illinois' public policy, held that Maryland's public policy exception would never apply outside of Maryland because the exception is limited to only those circumstances where a Maryland court is acting to protect a Maryland public policy. App. A, p. 6. As such, the Seventh Circuit reasoned that, in any event, Maryland would not apply the public policy exception to its *lex loci delicti* choice of law rules, even where to apply Maryland law would be abhorrent to the public policy of Illinois, the court in which the state sits, because Maryland has no interest in protecting Illinois citizens.

The Seventh Circuit was unconcerned with Davita's status as an Illinois citizen in terms of adjudicating her FTCA lawsuit. While, at the same time holding that a federal court hearing an FTCA case is to be considered as a federal forum, the court held that under the FTCA, federal hospitals must be treated like a state institution, holding the federal facility liable "to the same extent as a private individual under like circumstances." App. A, p. 7. The court reasoned that the federal military hospital in Maryland where Davita was sent for surgery should be treated no differently than a private civilian hospital in Maryland for purposes of determining whether Maryland's statutory limitation on damages should apply to reduce Davita's award. *Id.*

On the issue of the consequences of the United States' failure to plead the Maryland statute as an affirmative defense under Federal Rule of Civil Procedure 8(c), the Seventh Circuit admitted that there is a split in the Circuit Courts of Appeal on the issue. The Seventh Circuit held that, although it considered such limitations to be like other partial defenses, such as comparative negligence, which must be pled or are waived, it need not "resolve the conflict." App. A, p. 9. Acknowledging that the United States did not plead the Maryland limitation as an affirmative defense, the court did not find this failure to amount to a waiver because the failure did not work "a forfeiture" upon Davita. The court concluded that even though the defense was not raised before the district court until six weeks before she was scheduled to try her case on damages, there was no forfeiture because Davita's argument was factually unsupportable. *Id.* at 10.

The argument which Davita did advance, once the limitation was brought to the district court's attention, was that the United States should not be allowed to gain the advantage of Maryland's statutory limitation because the only reason that Davita was in Maryland in the first instance was that the United States' physicians in Illinois had breached their fiduciary duty to inform the Carters that Davita had the option of having the surgery at a civilian hospital in Illinois. Without the benefit of discovery on that issue, Davita argued that it would be inequitable for the United States to secure an advantage from Maryland's limitation because it was the United States' breach alone which resulted in the fortuity of Davita being transferred to Maryland for the high risk surgery.

While dismissing Davita's estoppel argument, the Seventh Circuit did admit that had Davita not been

transferred to Maryland, and had the surgery been done in Illinois, those facts would "have prevented the cap from attaching." App. A, p. 11. However, the court dismissed the estoppel issue, finding that Davita could not establish the elements of proximate cause between the breach of the duty and the loss suffered. The court reasoned that even if the limitation had been pled, because Davita could not establish an element of proximate cause required to sustain a standard tort claim based upon the violation of a statute or regulation, no estoppel could be sustained. App. A, p. 10.

## REASONS FOR GRANTING THE WRIT

### I. The Seventh Circuit's Determination That a Federal Court With Jurisdiction Over a Suit Under the Federal Tort Claims Act Must Apply Federal Procedural Rules to Determine Remedies, Irrespective of the Conflict of Law Rules of the State Where the Wrongful Act Occurred, Is an Important Federal Question; Which Now Conflicts With a Holding of a Sister Circuit; And Which Disregards This Court's Reasoning in *Richards v. United States*.

The Federal Tort Claims Act makes the United States liable for tortious conduct, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). The Act requires the application of the whole law of the state where the act or omission occurred, including that state's choice of law rules. *Richards v. United States*, 369 U.S. 1,

11 (1962). This Court in *Richards* emphasized that determination of conflict of law issues in FTCA cases should be flexible because the United States is to be treated as a "private individual under like circumstances." *Id.* at 12. To reach this goal, this Court held that federal courts should be able to take into account choice of law rules which consider "the interests of the State having significant contact with the parties to the litigation." *Id.* This Court reasoned that, in enacting the FTCA, Congress did not want an inflexible rule to govern a federal court's analysis of conflict of law issues. *Id.* at 15.

Maryland's conflict of law rules apply to Davita's FTCA lawsuit because Maryland is the state where the wrongful act, the negligent spinal surgery, occurred. 42 U.S.C. § 1346(b)(1). Under the FTCA, the federal court sitting in Illinois, has jurisdiction to hear and decide Davita's lawsuit because Illinois is the state where Davita resides. 28 U.S.C. § 1402.

Maryland's conflict of law rules states that, "[t]he court at the forum determines, according to *its* own Conflict of Law rule, whether a given question is one of substance or procedure." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 584 (1934) (emphasis added). Comment a to Section 584 of the Restatement (First), directs that the conflict of law rules of the forum which should be considered are the forum state's "internal rules with reference to transactions similar to the one in question." *Id.*

In Davita's case, applying Maryland's conflict of law rules, Illinois, as the forum state, would determine whether Maryland's damage limitation is substantive or procedural. *Dealers Mutual Ins. Co. v. Van Buskirk*, 241 Md. 58, 65, 215 A.2d 467, 471 (Md. Ct. App. 1965). In the

present case, applying Maryland's choice of law rules, Illinois law determines the measure of the remedy which governs Davita's medical malpractice award. *Doughty v. Prettyman*, 219 Md. 83, 88, 148 A.2d 438, 440 (Md. Ct. App. 1959); *Spring v. United States*, 833 F. Supp. 575, 575 (E.D. Va. 1993); MARYLAND LAW ENCYCLOPEDIA, *Conflict of Laws, Remedies* § 9 (2001).

Under the choice of law holding in *Richards*, the court should apply Illinois law with respect to remedies because that is what Maryland's "whole law" dictates. *Richards*, 369 U.S. at 11. Applying Illinois law requires the court to follow the Restatement (Second) of Conflict of Laws which, unlike Maryland, does not categorize any particular issue to be procedural or substantive for purposes of choice of law questions. Rather, under the Restatement (Second) of Conflict of Laws, the court should apply the law of the place with the most significant contacts or interests to whatever particular issue is before the court, whether it is an issue of liability or of the proper measure of damages. *Nelson v. Nix*, 122 Ill. 2d 343, 346-347, 522 N.E.2d 1214, 1216 (1988).[2]

The Seventh Circuit rejected Davita's assertion that Illinois law should apply to the issue of whether Maryland's statutory limitation should reduce her award, characterizing the Second (Restatement) of Conflict of Law's "interest-balancing" test as "maddeningly indefinite." App. A, p. 3. However, the court admitted that if the

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[2] Prior to the adoption by Illinois of the Restatement (Second) of Conflicts, Illinois courts deemed statues involving remedies to be procedural. *Orlicki v. McCarthy*, 4 Ill. 342, 347 (1954).

Restatement (Second) was applied to the facts in Davita's case, a court "might decide that Illinois, as the place of the residence of plaintiff . . . should furnish the rule of decision with respect to issues of damages as distinct from issues of liability." App. A, pp. 3-4.

As such, had the Seventh Circuit applied Maryland's whole law, including its choice of law rules as dictated by this Court's decision in *Richards*, the district court sitting in Illinois should have applied the "most significant interests" test to Davita's award.[3] Applying that test, there is little doubt that Illinois is, and was, the state with the most significant relationship to Davita. Davita's only contact with Maryland was that she was paralyzed there.

Illinois' highest court, in *Best v. Taylor*, 179 Ill. 2d 367, 689 N.E.2d 1057, 1069-1081 (1997), left no doubt that Illinois considers arbitrary limitations on noneconomic damages in medical malpractice cases, such as the limitation set forth in Maryland's statute, to be obnoxious to Illinois public policy. The court in *Best*, struck down as unconstitutional a nearly identical legislative attempt to limit the recovery of noneconomic damages on a number of grounds. *Id.* Had the Seventh Circuit followed this Court's reasoning in *Richards* in Davita's case, Davita should have been awarded the full amount of damages which the district court found her to be entitled to receive after

[3] The Seventh Circuit also noted that Maryland's highest court has never addressed the issue of whether Maryland's damage limitation is procedural or substantive. App. A, p. 4.

conducting the trial on damages. IL. CONST. ART. 1, § 12; *Best v. Taylor*, 179 Ill. 2d 367, 689 N.E.2d 1057, 1069-1081 (1997).

Additional evidence that applying Maryland's statute to reduce Davita's recovery would violate Illinois public policy is found in the Bill of Rights to Illinois' Constitution, which states in part:

> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property, or reputation. He shall obtain justice by law, freely, completely, and promptly.

IL. CONST. ART. 1, § 12. The Illinois Supreme Court has held this provision, referred to as the certain remedy clause, is a statement of "constitutional philosophy" which strongly reflects Illinois' public policy. *Best*, 689 N.E.2d at 1100.

Thus, application of Maryland's statutory limitation on Davita's recovery of noneconomic damages would clearly offend the public policy of Illinois. The issue which is raised is whether a federal court, sitting in Illinois, can apply federal common law in such a way as to deny the constitutional rights which Illinois courts have guaranteed to its citizens, especially under a statute which requires the United States to be treated as a private person would be under like circumstances. 28 U.S.C. § 1346(b).

Although not discussed by the Seventh Circuit, federal courts in diversity cases have regularly refused to apply laws which offend the forum state's public policy, despite the fact that the court sits as a "federal forum." For example, in *Rieger v. Group Health Assoc.*, 851 F. Supp. 788, 790 (N.D. Miss. 1994), the court applied Mississippi's

choice of law rules to determine that Maryland substantive law applied to the tort action before it. The court, however, refused to apply Maryland's pure contributory negligence principles. The court held that limiting recovery for the Mississippi plaintiff because of Maryland's strict rule was "repugnant to the public policy of Mississippi." *Id.* The court noted that: "Mississippi has long recognized that when certain aspects of the law of a foreign jurisdiction are repugnant and offensive to the public policy of this state, the forum court should decline the opportunity to give credence to same and instead apply the better reasoned rule of law adopted by Mississippi." *Id.* at 792; *see also, Loge v. United States*, 662 F.2d 1268, 1274 (8th Cir. 1981); *Tyminski v. United States*, 481 F.2d 257, 259-260, 267 (3rd Cir. 1973).

The application of Illinois law is also supported by the fact that Davita's connection with Maryland was a mere fortuity, in that she had never been to Maryland. In addition, the application of Maryland's limitation would do nothing to serve the legislative purpose behind that limitation. In fact, the legislative history behind Maryland's limitation demonstrates that Maryland has no interest in limiting the rights of non-citizens, like Davita, who are treated at a federal military hospital located in Maryland.

Maryland enacted its statutory limitation in an attempt to assist *its* citizens with respect to rising insurance premiums. *Black v. Leatherwood Motor Coach Corp.*, 92 Md. App. 27, 46, 606 A.2d 295, 304 (Md. Ct. Spec. App. 1992)(the "General Assembly's objective in enacting the cap was to assure the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public"). *See also,*

*Oaks v. Connors*, 339 Md. 24, 33, 660 A.2d 423, 428 (Md. Ct. App. 1995); *Judge Trucking Co., Inc. v. Estate of Cooper*, Nos. 92C-03-041, 93C-04-023, 93C-07-025, 1994 WL 680029 at *3, 5 (Del. Super. Ct. Sept. 19, 1994) (refusing to apply Maryland's statutory limitation on noneconomic damages because Delaware had no such cap and there would be no impact on Maryland's citizens or its insurance industry to see that Delaware's citizens recover their full jury award.) As such, refusing to apply Maryland's limitation on noneconomic damages to Davita's damage award accomplishes nothing with respect to Maryland's interests, while simultaneously eroding the traditional interests protected by tort law.

The Seventh Circuit rejected Davita's argument that Illinois law should apply, holding that the argument "founders" because Illinois "is not the forum state for purposes of conflicts analysis under the Tort Claims Act." App. A, p. 5. The Seventh Circuit held that despite the fact that the federal court which heard Davita's lawsuit sits in Illinois, the court is a "federal forum." *Id.* The Seventh Circuit reasoned that, whatever the conflict of law rules of the state where the act or omission occurred might dictate, the federal court must always follow federal procedural law. *Id.* The court then held that, under federal law, questions concerning the proper measure of damages would never be considered substantive. *Id.*

To allow the Seventh Circuit's reasoning to stand would abrogate this Court's long-standing holding in *Richards*. If the Seventh Circuit's holding in Davita's case is allowed to become the rule of law, whenever there is a conflict between the law of the state where the wrong occurred, and the law in which the court sits, federal law will preempt the application of the "whole law" of the state

of the wrong. Because FTCA lawsuits may only be filed in a federal court, the Seventh Circuit's decision, by necessity, eradicates this Court's "whole law" ruling in *Richards.*

The Seventh Circuit's choice of law analysis in Davita's case also conflicts, on a related issue, with a decision recently handed down by the Circuit Court of Appeals for the Ninth Circuit. In *Al varez-Machain v. United States*, 331 F.3d 604, 633 (9th Cir. 2003), the court was also presented with a conflict of law issue respecting a damage limitation in an FTCA lawsuit. In *Al varez-Machain*, the plaintiff sought remedies under both the FTCA and the Alien Tort Claims Act, and the court concluded that the California district court which decided the case was a "federal forum" for purposes of determining the conflict of law issue presented. However, unlike the Seventh Circuit in the present case, the court ruled that a federal forum would apply "federal common law" to determine the conflict issue and further ruled that the federal common law applicable to conflict of law issues on damage limitations is that set forth in the Restatement (Second) of Conflict of Laws. (the federal common law would look to the "Restatement (Second) of Conflict of Laws [] for guidance.")

Applying the Restatement Second of Conflicts' "most significant relationship to the occurrence test," the court in *Al varez-Machain* determined that California law had the most significant relationship to the issue of whether the limitation on damages should be applied to the plaintiff's award. The court refused to limit the plaintiff's damage award, finding that California was the jurisdiction with the more significant interest in the damage issue. *Id.*

If the rule of decision in FTCA cases with respect to conflict of law issues is not the rule set forth by this Court in *Richards*, but rather is a matter to be determined by the law of a "federal forum," another important question of federal law arises: Which Court of Appeals is correct as to what conflict of law rule constitutes "federal common law." The Seventh Circuit's decision in Davita's case instructs federal courts to reject, as "maddeningly indefinite," the Restatement (Second) of Conflict of Laws "interests test" in deciding FTCA conflict questions. App. A, p. 3. The Ninth Circuit, on the other hand, instructs federal courts to apply the Restatement (Second) of Conflict of Laws "interests test."

As admitted to by the Seventh Circuit, if Davita's damage award is analyzed under the "significant interests" test, there is a chance that the court would refuse to apply Maryland's limitation to reduce Davita's award. *Id.* Accordingly, this issue is not simply an important federal question upon which the Circuit Courts of Appeal differ, but is a question which, correctly resolved, would result in Davita being awarded the full amount of damages which the district court determined that she was entitled to recover for the catastrophic injuries which she must live with for the rest of her life.

In summary, the Seventh Circuit's opinion in this case sets forth important issues of federal law relating to decisions which must be made by the federal courts deciding conflict of law issues in FTCA actions. The first issue implicates this Court's "whole law" ruling in *Richards*, and the question of whether that law is still binding upon federal courts. The second issue, which becomes applicable if *Richards* is reversed, is whether, with respect to FTCA actions, federal courts deciding FTCA conflict of

law issues should follow the decision of the Seventh or the Ninth Circuits as to what Restatement of Conflict of Laws should be followed.

## II. Whether Maryland Law Would Require the Application of Its Statute to Limit the Damage Award of an Illinois Citizen Because Illinois Has Unequivocally Deemed the Application of Such a Limitation to Be Offensive to Illinois Public Policy.

Historically, the individual states of the United States of America have given full force and effect to the rights of their sister states, unless to apply a particular law would be offensive to the public policy of that sister state. Regardless of which conflict of law theory is employed, if a forum state's application of a sister state's law would be offensive to the public policy of the state in which the court sits, the offensive law is not applied.

This doctrine was, at the time when the majority of the states followed the Restatement (First) of Conflict of Laws, referred to as the "public policy exception" to the application of *lex loci delicti*. While the vast majority of states have now abandoned the Restatement (First) of Conflicts in favor of the "interests test" found in the Restatement (Second), complex issues arise when conflict of law questions involve one state which adheres to *lex loci delecti*, while others follow the majority's "interest" rule. This level of complication rises even further when issues of federalism enter the equation.

When the *Erie* doctrine applies, the issue is straightforward. Where competing interests of sister states are being adjudicated in a diversity lawsuit filed in federal

court, federal courts apply the law of state where the court sits. *Odekirk v. Sears Roebuck & Co.*, 274 F.2d 441, 445 (7th Cir. 1960). In diversity cases, federal courts apply the substantive law of the state where it sits while applying the federal rules governing procedural issues. When substantive conflict issues do arise, it is the role of the federal government to "choose in each case between the competing public policies involved." *See Pearson v. Northeast Airlines, Inc.*, 307 F.3d 131, 134, *aff'd en banc*, 309 F.2d 553 (2nd Cir. 1962).

The question is not so straightforward, however, when federal courts, which are the only courts with jurisdiction to hear FTCA claims, are called upon to apply the whole law of the place of the wrong, including that state's choice of law question, especially where the law of the place of the wrong dictates that the court apply another state's law. *See Richards v. United States*, 369 U.S. 1, 11 (1962).

Davita's case presents an excellent example of this scenario, and raises a question which has never been addressed by this Court. In Davita's case, the wrongful acts and omissions which led to her permanent paraplegia took place in Maryland where the United States sent Davita for surgery. However, Davita was, and remains, a citizen of the State of Illinois, a state wherein the United States, under the FTCA, expressly consented to have her FTCA claim adjudicated. 28 U.S.C. § 1402(b).

The Seventh Circuit does not dispute that Maryland's conflict of law rules recognize a public policy exception to the selection, under *lex loci delicti* conflict of law rules, where Maryland public policy would be offended by the application of the law of a sister state. App. A, p. 6. However, without citation to any authority, the court states

that Davita "has it backwards" because Maryland would only care about Maryland's public policies. *Id.* at 6.

The Maryland courts which have explained the exception, however, do not limit application of the exception to the protection of Maryland's policies (and, of course, could never have the opportunity to do so because Maryland's courts are always located in Maryland and would always be discussing Maryland's public policy). However, the rationale behind the public policy exception to *lex loci delecti*, as explained by a Maryland intermediate court, does not suggest that the exception should be limited to protecting Maryland's public policies. As the courts have held: "[S]everal Maryland cases suggest that where an overriding issue of the forum's public policy is at stake, such public policy may provide a sufficient basis for overruling the principle of lex loci delicti and applying forum law to the case." *Black v. Leatherwood Motor Coach Corporation*, 923 Md. App. 27, 43, 606 A.2d 295, 302 (Md. Ct. Spec. App. 1992). Another Maryland court, in *Rhee v. Combined Enterprises*, 74 Md. App. 214, 536 A.2d 1197, 1201 (Md. Ct. Spec. App. 1988), explained: "The rationale is usually based upon a public policy analysis which questions whether the application of the lex loci delicti is so abhorrent and harmful to the citizens of the forum domicile" that the forum court need not apply the foreign law. *Id.* As the Maryland courts have explained, it is the "public policy of the domicile forum state [which] becomes the issue." *Id.*

The Seventh Circuit agreed that: "[I]f Maryland thinks that the public policy of the place where a suit is brought is a trump, we would be bound because Maryland conflicts principles are controlling in this case." App. A, p. 6. However, without citing any Maryland or other

authority, the Seventh Circuit concluded that: "Maryland does not think this." App. A, p. 6. The issue arising from this particular conclusion is whether the Seventh Circuit can construe Maryland's public policy exception, without support from Maryland authority, in a way that affirms a result that offends the constitutional rights of an Illinois citizen to receive the full recovery to which they are entitled.

In its decision, the Seventh Circuit did not even attempt to weigh the policy interests of Illinois against those of Maryland. In fact, the court justified its decision on the public policy exception issue by using the opposite analysis which it used in rejecting Davita's argument that Illinois was the forum state for purposes of applying Maryland's conflict of law rules. Rejecting Davita's first argument, the Seventh Circuit concluded that Davita "loses" because a court sitting in Illinois, hearing an FTCA case, does not have to act as an Illinois "forum court." Then, rejecting Davita's second argument that Maryland's public policy exception would preclude the application of Maryland's limitation, the court reasoned that the federal hospital in Maryland was not to be treated like a federal institution but rather a state institution. App. A, p. 7. This was the court's conclusion, whether Maryland has any interest protecting a federal institution being sued by an Illinois resident, or not.

Accordingly, for purposes of Davita's first argument, the United States is treated differently because the court hearing the case is a federal forum. Yet, for purposes of Davita's second argument, the federal facility must be treated identically to a civilian Maryland facility. The court stated that the federal hospital had to be treated:

"[T]o the same extent as a private individual under like circumstances." App. A, p. 7.

If the Seventh Circuit is correct in rejecting the application of Maryland's choice of law public policy exception because the federal court hearing the FTCA lawsuit is to be considered a "federal forum" applying federal procedural law, then the Seventh Circuit's reasoning that: "[T]he defendant is a federal institution is inadmissible," is inconsistent. App. A, p. 7. If the federal hospital in question is to be liable to the "same extent as a private hospital under like circumstances," the hospital should be treated no better or worse than any Maryland hospital would be if properly sued in Illinois, whether sued in a state, or a federal forum. Certainly, had Davita been injured by the malpractice of a Maryland hospital, and had she filed suit against that hospital under the federal court's diversity jurisdiction in her home state of Illinois, even the Seventh Circuit would concede that Illinois law may govern Davita's damage award. *Id.*

In questions respecting conflicts of laws between states, the United States courts should not be allowed to pick and choose the law which most benefits the government.

## III. Whether The United States Waived Any Limitation Provided by Maryland's State Statute.

The United States Circuit Courts of Appeals are divided as to whether a statutory limitation on non-economic damages is an affirmative defense which is waived if not timely pled. *Simon v. United States*, 891 F.2d 1154, 1157 (5th Cir. 1990); *Ingraham v. United States*, 808 F.2d 1075, 1078-79 (5th Cir. 1987); *Jakobsen v. Massachusetts*

*Port Authority*, 520 F.2d 810, 813 (1st Cir. 1975); *Bentley v. Cleveland County Bd. of County Comm'rs*, 41 F.3d 600, 604-05 (10th Cir. 1994). *But see Taylor v. United States*, 821 F.2d 1428 (9th Cir. 1987).[4]

In Davita's case, the Seventh Circuit agreed with the majority of the Circuits and found that Maryland's statutory limitation on damages was akin to other partial defenses, such as comparative negligence, which must be pled under the Federal Rules of Civil Procedure or are waived. App. A, p. 8. However, the court also held that, despite the fact that the United States did not plead any affirmative defense in Davita's lawsuit, the Seventh Circuit need not take sides in the conflict. App. A, p. 9.

The Seventh Circuit rested its determination upon its statement that although the United States "delayed" in failing to plead the Maryland statute as an affirmative defense, this "delay" in asserting the defense in its "answer works as a forfeiture only if plaintiff is harmed by the defendant's delay in asserting it." App. A, p. 9. The United States, however, did not "delay" in pleading the affirmative defense in Davita's case, it *never* pled Maryland's limitation as an affirmative defense, even after the statute was brought to the lower court's attention six weeks prior to trial.

While the Seventh Circuit conceded that the United States, in defending itself in FTCA lawsuits, should be treated like any other litigant or "otherwise it would be impossible to litigate against the government because

[4] This Court previously declined to resolve the conflict created among the circuits by the Ninth Circuit's decision in *Taylor*.

none of its tactical decisions would be binding on it," the court rejected as "lurid" the only argument which Davita had enough time to develop and argue to the district court prior to her scheduled trial on damages. App. A, p. 10.

These circumstances vividly illustrate the reasoning underlying the holding of the Court of Appeals for the Fifth Circuit in *Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987) (citation omitted). In *Ingraham*, the court held that the United States was barred from raising a state limitation on damages, stating:

> Central to requiring the pleading of affirmative defenses is the prevention of unfair surprise. A defendant should not be permitted to "lie behind a log" and ambush a plaintiff with an unexpected defense.

This is precisely what happened in Davita's case. Had the United States pled its intention to invoke Maryland's statutory limitation on noneconomic damages as an affirmative defense, Davita may well have been able to develop a legal theory and secure the necessary factual predicates to prove to the lower court that the United States defense should not be applied.

Moreover, the Seventh's Circuit analysis on the issue of waiver is internally inconsistent. If, as the Seventh Circuit implies, there was actually *no* legal theory *or* factual premise upon which Davita could ever have developed an argument to defeat the application of Maryland's statutory limitation, why would the Seventh Circuit agree that the limitation is an affirmative defense which the United States was required to plead under Rule 8(c). App. A, p. 8.

The purpose of Rule 8(c) is to allow a plaintiff the time and opportunity to garner arguments and evidence to defeat an affirmative defense which a defendant intends to assert at trial. However, the purpose behind this rule is eviscerated where, as here, the defense was never pled at all. In addition, in light of the rule's purpose, the Seventh Circuit's rejection of the argument, advanced by Davita just six weeks before Davita's trial on damages, and without the benefit of discovery, is plainly inequitable.

Had the United States properly pled its affirmative defense, Davita may well have had the opportunity to explore other legal or factual bases which would have defeated the unpled affirmative defense. Davita was clearly prejudiced by the fact that she had no meaningful opportunity to conduct discovery and research this complicated issue.

In its decision, the Seventh Circuit rejected as "lurid" Davita's argument that the United States should have been estopped from gaining the advantage of Maryland's statutory limitation on damages based upon the testimony of Davita's mother that the United States' physicians never told the Carters that Davita could secure treatment at a civilian hospital in Illinois. In fact, the physicians employed by the United States informed the Carters that Davita could only receive the required treatment at two federal military facilities, one located in California and one in Maryland. Both states severely cap damages in medical malpractice actions. Davita argued that this breach of duty, in violation of the government's own health care regulation, should deprive the United States of any advantage it might have received from sending Davita to

Maryland for the surgery that resulted in her permanent paraplegia.

Under the FTCA, the federal government is to be treated as a "private person under like circumstances." 28 U.S.C. § 1346(b)(1). Had a private hospital in Maryland failed to provide the Carters with the material information necessary for them to make an informed decision regarding Davita's care, including information about the consequences of negligently performed care, that breach would have estopped a private hospital from taking advantage of Maryland's limitation.[5] Given the opportunity, Davita well may have been able to defeat the limitation by arguing that any "private person," including the United States, is not immune from making conscience decisions, and breaching their fiduciary duties, in an attempt to save money. *See* John J. Fialka, *Judge Holds Interior Secretary*

[5] The United States' failure to inform the Carters of the existence of a material treatment option constituted a violation of medical ethics as well as the government's own mandate under its CHAMPUS program. The American Medical Association describes the patient-physician relationship as including the duty to inform that: "The patient has the right to receive information from physicians and to discuss the benefits, risks, and costs of appropriate treatment alternatives." Opinion E-10.01 of the Code of Medical Ethics, AMA's Counsel on Ethical and Judicial Affairs; *See also, Weiss v. CIGNA Healthcare, Inc.*, 972 F. Supp. 748, 751 (S.D.N.Y. 1997) (wherein the HMO's "gag rule" violated a fiduciary duty owed a patient because an insurer's policy of restricting the disclosure of non-covered treatment options would, if true, directly undermine the ability of plan participants to have unfettered access to all relevant information relating to their physical and mental condition and treatment options). *Id., citing*, Council on Ethical and Judicial Affairs, American Medical Association, *Ethical Issues in Managed Care*, Council Report, 273 JAMA 330 (Jan. 25, 1995).

*in Contempt Over Indian Trust*, WALL ST. J., Sept.18, 2002, at A6.

A failure to plead an affirmative defense may well lead to serious consequences, as well demonstrated by Davita's case:

> Prejudice was not limited merely to cutting down the plaintiff's time to study and meet an extremely difficult issue. The delay undercut plaintiff's ability to develop facts and fashion his case in a manner relevant to this defense. It also prejudiced the judge's ability to focus on the facts as they unfolded so as to rule properly on the claim. . . .

*Jakobsen v. Massachusetts Port Authority*, 520 F.2d 810, 816 (1st Cir. 1975).

The Seventh Circuit's decision recognizes that the Maryland limitation is an affirmative defense which should have been pled. It also recognizes that the United States should not be allowed to gain tactical advantages in litigation by failing to plead required affirmative defenses. What the court appears to ignore is that these conclusions deprived Davita of the nearly $15,000,000 that she was found entitled to receive.

## CONCLUSION

This Court should grant this Petition for Writ of Certiorari for a number of reasons. First, the issue of whether a federal court hearing an FTCA is to act as a "federal forum," apply federal procedural rules, for purposes of applying the whole law of the state of the wrong,

including its choice of law rules, is an issue of first impression in this Court, which should be answered for the benefit of courts and litigants.

Second, this Court should clarify that a federal court cannot trammel the constitutional rights of the citizen of the state wherein it sits, especially under a statute that requires the United States to be treated as any other private individual or institution should be treated, and where to do so violates the public policies of a sister state.

Finally, the Seventh Circuit, while giving lip service to the necessity to plead affirmative defenses, including partial defenses, and the necessity of requiring the United States to follow the same rules as other litigants, should not be allowed, in this tragic case, to avoid the consequences of its failure to do so in this case. This Court should also consider this petition to resolve the split in the Circuit Courts of Appeal on the issue of whether statutory limitations on damages must be pled, and make clear that any partial defense to damages must be pled under Federal Rule of Civil Procedure 8(c).

November 17, 2003

Respectfully submitted,

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**In the**
**United States Court of Appeals**
**for the Seventh Circuit**

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No. 02-3355

DAVITA CARTER,

*Plaintiff-Appellant,*

*v.*

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

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Appeal from the United States District Court
for the Central District of Illinois.
No. 00 C 4036 – **Joe Billy McDade**, *Chief Judge.*

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ARGUED FEBRUARY 20, 2003 – DECIDED JUNE 24, 2003

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Before BAUER, POSNER, and WILLIAMS, *Circuit Judges.*

POSNER, *Circuit Judge.*

Surgery at Bethesda Naval Hospital in Maryland to correct 11-year-old Davita Carter's severe scoliosis (curvature) of the spine left her a paraplegic and precipitated this suit for medical malpractice. Her father is a Marine veteran, and his veterans' benefits entitled his daughter to treatment at the government's expense. Bethesda Naval Hospital is of course a federal hospital, and so the suit is under the Federal Tort Claims Act.

The Act authorizes suit in the judicial district where the plaintiff lives or the alleged tort occurred. 28 U.S.C. § 1402(b). The plaintiff lives in the Central District of Illinois, and that is where the suit was filed, the alternative venue being of course the District of Maryland. The district judge granted summary judgment for the plaintiff on liability and then conducted a bench trial on damages that resulted in his finding that the plaintiff had sustained $3.4 million in economic damages (past and future medical expenses plus lost future earnings) and another $15.5 million in noneconomic damages (permanent disability, disfigurement, physical and emotional pain and suffering, and loss of enjoyment of life). But the judge reduced the award for noneconomic damages to $530,000, the maximum allowed under Maryland law. The plaintiff appeals that ruling. Neither she nor the government challenges the award of $3.4 million in noneconomic damages and upon the request of both parties we entered a partial final judgment in the plaintiff's favor for that amount. *Barnes v. United States,* 678 F.2d 10, 11-13 (3d Cir. 1982); *Dempsey v. United States,* 32 F.3d 1490, 1497-98 (11th Cir. 1994) (per curiam) (concurring opinion).

It is curious, though, that a judgment by *any* court should be thought necessary when the government not only acknowledges that it owes the plaintiff the $3.4 million in economic damages that the district court awarded but wants to pay the money promptly. For mysterious bureaucratic reasons, however, the government would not pay this amount that it acknowledges owing without our affirming the part of the district court's judgment that covers that amount. The reasons are especially mysterious because the filing of an appeal by the prevailing party does not stay the judgment in his

favor unless he is seeking to change the form of the relief that he obtained in the district court (for example, from damages to specific performance) rather than, as in this case, merely seeking more of the same. *BASF Corp. v. Old World Trading Co.*, 979 F.2d 615, 616-17 (7th Cir. 1992); *Trustmark Ins. Co. v. Gallucci*, 193 F.3d 558, 558-59 (1st Cir. 1999) (per curiam); *Enserch Corp. v. Shand Morahan & Co.*, 918 F.2d 462, 464 n. 3 (5th Cir. 1990); contra, *Tennessee Valley Authority v. Atlas Machine & Iron Works, Inc.*, 803 F.2d 794, 797 (4th Cir. 1986). But having entered the requested judgment we need not pursue the issue of its necessity further.

The Federal Tort Claims Act authorizes the imposition of tort liability on the federal government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). That place was Maryland, and a statute of Maryland imposes a cap on noneconomic damages of $530,000. Md. Code, Cts. & Jud. Proc. § 11-108(b)(2). The Supreme Court has held, however, that the reference in the Tort Claims Act to "the law of the place where the act or omission occurred" is a reference to the entire law of the place, including its conflict of laws principles, *Richards v. United States*, 369 U.S. 1, 10-13 (1962), and the plaintiff in our case argues that Maryland conflict of laws principles would look to Illinois law to supply the rule of decision on damages-related issues – and Illinois does not have a cap on noneconomic damages.

If Maryland followed the maddeningly indefinite "interest-balancing" approach to conflicts issues, it conceivably might decide that Illinois, as the place of residence of the plaintiff (not as the forum state – for a reason

that will become apparent shortly), should furnish the rule of decision with respect to issues of damages as distinct from issues of liability. See, e.g., *Miller v. Miller,* 237 N.E.2d 877, 878-80 (N.Y 1968). But Maryland does not follow such an approach; it adheres to the old-fashioned conflicts principle of "*lex loci delicti,*" whereby the law of the place where the tort occurred (the English translation of the Latin phrase), Maryland in this case, supplies the rule of decision on all substantive issues. *Philip Morris Inc. v. Angeletti,* 752 A.2d 200, 230-31 (Md. 2000); *Hauch v. Connor,* 453 A.2d 1207, 1209 (Md. 1983). But is a damages cap procedural or substantive for this purpose? It is the latter, according to Maryland's intermediate appellate court. *Black v. Leatherwood Motor Coach Corp.,* 606 A.2d 295, 300-01 (Md. App. 1992); *Naughton v. Bankier,* 691 A.2d 712, 716 (Md. App. 1997); see also *Houben v. Telular Corp.,* 309 F.3d 1028, 1035 (7th Cir. 2002); *Bush v. O'Connor,* 791 P.2d 915, 919 (Wash. App. 1990). This is sensible, because a cap on damages reflects a judgment about the severity of the sanction appropriate to regulate the activity of potential injurers.

But even if Maryland's highest court, which has not yet addressed the issue, would disagree and hold that a damages cap was procedural, the plaintiff could not prevail. Her argument is that since Illinois is the forum state, Illinois' procedural law should govern under Maryland conflicts principles, which make the law of the forum controlling on procedural issues. E.g., *Black v. Leatherwood Motor Coach Corp., supra,* 606 A.2d at 300; see also *Shaps v. Provident Life & Accident Ins. Co.,* 826 So. 2d 250, 254 n. 3 (Fla. 2002); *Nebraska Nutrients, Inc. v. Shepherd,* 626 N.W.2d 472, 517 (Neb. 2001). The argument founders on the fact that Illinois, though it is the state in

which the federal district court that the plaintiff sued is located, is not a forum state for purposes of conflicts analysis under the Tort Claims Act. And on the further fact that the reference in 28 U.S.C. § 1346(b) to "*the law* of the place where the act or omission occurred" is to the substantive law (broadly understood to include remedial law, such as the damages cap, as well as, of course, the conflict of laws rules) of the state where the act or omission occurred, see *Jackson v. United States,* 881 F.2d 707, 711-12 (9th Cir. 1989), since the court one sues in will apply its usual procedures even if it is required by conflicts principles to apply the substantive law of a foreign state. The court that the plaintiff sued in was a federal court, not an Illinois state court, and the procedures it applies are federal, not state, procedures, regardless of the source of the substantive rules in the case. This has been the law since 1938, when the Federal Rules of Civil Procedure superseded the Conformity Act, under which federal courts had conformed their procedures to those of the state in which the court was located. See, e.g., *Houben v. Telular Corp., supra,* 309 F.3d at 1032; *Odekirk v. Sears Roebuck & Co.,* 274 F.2d 441, 445 (7th Cir. 1960).

So even if Maryland would regard a damages cap as a procedural rule (the federal courts certainly would not, *Houben v. Telular Corp., supra,* 309 F.3d at 1035), it is not a *federal* procedural rule and so it did not bind the federal district court in this case. E.g., *Jastremski v. United States,* 737 F.2d 666, 672 (7th Cir. 1984); *Jackson v. United States, supra,* 881 F.2d at 712. Maryland could not require a federal district court to jettison federal in favor of state procedural law if it wanted to, and there is no evidence it wants to.

But like most states Maryland has a "public policy" exception to its usual conflicts rules, whereby a court in the forum state will decline to enforce a foreign state's rule of law if that rule would offend the public policy of the forum state. *Black v. Leatherwood Motor Coach Corp., supra,* 606 A.2d at 302-03; *Hartford Mutual Ins. Co. v. Bruchey,* 238 A.2d 115, 117-18 (Md. 1968). The plaintiff argues that Maryland would defer to Illinois law in regard to damages caps, not because Illinois lacks such caps but because the Illinois constitution has been interpreted by the Illinois courts to forbid such caps, *Best v. Taylor Machine Works,* 689 N.E.2d 1057, 1069-81 (Ill. 1997), thus indicating that they are indeed offensive to the public policy of Illinois – that their omission from Illinois law is not merely an accident. This argument does not depend on the implausible classification of a damages cap as a procedural rule, and so is less vulnerable to the counter-argument that Illinois is not the forum state in a federal tort claims suit. Illinois is the place where the suit was brought, and if Maryland thinks that the public policy of the place where a suit is brought is a trump, we would be bound because Maryland conflicts principles are controlling in this case.

But Maryland does not think this. The plaintiff has got Maryland law backwards. When a suit brought in Maryland arises out of a tort in another state, the court will decline to enforce a provision of the law of that other state that offends Maryland public policy. In this way Maryland protects its own policies. If the suit is brought in another state but the substantive law applicable is that of Maryland, Maryland would subvert rather than protect its own policies by a rule that directed the forum court to disregard a provision of Maryland law. It has no such rule.

The plaintiff argues that since she is a nonresident of Maryland and Bethesda Naval Hospital is a federal institution rather than a private or Maryland state hospital, Maryland has no interest in enforcing its damages cap. The fact that the plaintiff is not a Maryland resident does not bear on the issue because the damages cap is for the protection of defendants rather than plaintiffs. And the fact that the defendant is a federal institution is inadmissible because the federal government has consented to having tort liability imposed on it only "to the same extent as a private individual under like circumstances." 28 U.S.C § 2674. This requires us to treat Bethesda Naval Hospital like any nonfederal hospital in Maryland. *Carter v. United States,* 982 F.2d 1141, 1143-44 (7th Cir. 1992); *Knowles v. United States,* 91 F.3d 1147, 1150 (8th Cir. 1996); *Owen v. United States,* 935 F.2d 734, 737-38 (5th Cir. 1991); *Starns v. United States,* 923 F.2d 34, 37 (4th Cir. 1991).

The plaintiff has a further argument – that even if the damages cap applies to her case the government has forfeited its application, either by failing to plead the cap as an affirmative defense in a timely manner (that is to say, in the answer to the complaint) or by operation of the doctrine of equitable estoppel. Regarding the second ground, equitable estoppel, it has been reasonably clear ever since *Office of Personnel Management v. Richmond,* 496 U.S. 414 (1990), and *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95-96 (1990), discussed in *Goodhand v. United States,* 40 F.3d 209, 213-14 (7th Cir. 1994), that while the federal government cannot be estopped by the representations of a federal employee to refuse to make a disbursement that violates a federal statute – otherwise employees of the executive branch could usurp Congress's

authority over government expenditures – it can be estopped to plead defenses in lawsuits, such as the statute of limitations in *Irwin* and *Goodhand,* or, we add today, a partial defense limiting damages; otherwise it would be impossible to litigate against the government because none of its tactical decisions in litigation would be binding on it.

The plaintiff filed her complaint in March of 2000 and the government's answer, which did not mention the damages cap, was filed in May. Eventually the plaintiff learned that the government planned to invoke the cap, and in November of 2001, about six weeks before the trial on damages, she asked the judge to rule that the cap was inapplicable, and he declined. The government argues that a limitation on damages is not an affirmative defense and therefore need not, as required by Fed.R.Civ.P. 8(c) in the case of such defenses, be pleaded in the answer. The cases are divided on the question. Compare *Taylor v. United States,* 821 F.2d 1428, 1433 (9th Cir. 1987) (no), with *Simon v. United States,* 891 F.2d 1154, 1157 (5th Cir. 1990) (yes), and *Jakobsen v. Massachusetts Port Authority,* 520 F.2d 810, 813 (1st Cir. 1975) (also yes). A cap on damages is only a partial defense, but that is true of any defense that is limited to the amount of damages, and in that respect it is no different from comparative negligence, which clearly is an affirmative defense. *A.D.E. Inc. v. Louis Joliet Bank & Trust Co.,* 742 F.2d 395, 397 (7th Cir. 1984); *Marino v. Otis Engineering Corp.,* 839 F.2d 1404, 1406 n. 3 (10th Cir. 1988). The argument against treating a cap on damages as an affirmative defense is that it is contingent on the amount of damages sought, which the plaintiff is not required to set forth in his complaint.

We need not resolve the conflict. The failure to plead an affirmative defense in the answer works a forfeiture only if the plaintiff is harmed by the defendant's delay in asserting it, *Bayou Fleet, Inc. v. Alexander,* 234 F.3d 852, 860 (5th Cir. 2000); see also *Dresser Industries, Inc. v. Pyrrhus AG,* 936 F.2d 921, 928 (7th Cir. 1991); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.,* 811 F.2d 326, 334 (7th Cir. 1987), and there was no harm here. There might be harm in a case such as this if for example a plaintiff had some leeway in classifying damages as economic rather than noneconomic, or if knowledge that noneconomic damages were unavailable would have induced her to devote less effort to proving up such damages and more to proving her economic damages. *Simon v. United States, supra,* 891 F.2d at 1157; *Ingraham v. United States,* 808 F.2d 1075, 1079 (5th Cir. 1987). This by the way is a powerful argument for regarding a damages cap as an affirmative defense.

Neither form of harm is argued here, but what *is* argued is that had the plaintiff known earlier what was coming she would have devoted additional efforts to developing her alternative ground for beating the cap, namely equitable estoppel. If no federal hospital in her area had the expertise necessary to treat her condition – and none did – she would have been entitled to obtain that treatment at a nonfederal hospital at the government's expense. See 32 C.F.R. §§ 199.4(a)(1), (9), (10); *Dempsey v. United States, supra,* 32 F.3d at 1493-94. She contends that the government failed to advise her parents of this option, instead steering her to Bethesda though her parents would have much preferred a local private hospital and there was one with the necessary expertise. Had she been operated on locally with the same unfortunate

result and had sued, she would not have encountered Maryland's damages cap. Even so, she has no defense, and not for a reason that a further factual inquiry might dispel.

If the government violated a legal duty to her by failing to advise her parents of the local-treatment option, she conceivably may have a remedy of some sort; but the violation, if it occurred (which we do not decide), cannot operate to defeat the damages cap. No facts that might have emerged had the government flagged its reliance on the cap earlier would affect this conclusion – even the plaintiff's lurid and highly improbable speculation that the government steered her to Bethesda in order to limit its potential liability for noneconomic damages should the operation be performed negligently and thus give rise to this suit. An injury resulting from the violation of a statute (or other source of a legal duty, such as the regulation concerning treatment options on which the plaintiff relies) is actionable under tort law only if the statute was intended to avert the kind of injury that occurred. In the leading case of *Gorris v. Scott,* 9 LR-Ex. 125 (1874), a hardy antique, the plaintiff's animals, while being transported on the defendant's ship, were washed overboard and drowned when a storm struck it. The ship was not equipped with pens that were required by a statute in order to prevent the spread of disease among the animals. Had there been pens, the animals would have been saved from a watery death. The suit for their loss was based on the statutory violation and failed because the statute was not aimed at preventing animals from being washed overboard. (To similar effect see *Atlantic Mutual Ins. Co. v. Kenney,* 591 A.2d 507, 510-11 (Md. 1991); *Pahanish v. Western Trails, Inc.,* 517 A.2d 1122, 1132 (Md. App. 1986);

*Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1258 (7th Cir. 1995); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 708-09 (7th Cir. 1984); *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234, 237 (2d Cir. 1996); W. Page Keeton *et al., Prosser & Keeton on the Law of Torts*, § 36, pp. 222-25 (5th ed. 1984)). It is the same here. The regulation concerning notice of treatment options that the government is alleged to have violated has nothing to do with a loss of damages resulting from the existence of a statutory cap. Had the regulation been complied with, it would, we may assume, have prevented the cap from attaching, just as the statute in *Gorris* if complied with would have saved the animals. But in neither case was (is) this enough, because of the mismatch between the purpose of the statute or regulation and the nature of the injury that compliance might have prevented.

AFFIRMED.

A true copy:

Teste:

*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX B

## UNITED STATES DISTRICT COURT
## CENTRAL DISTRICT OF ILLINOIS

| | | |
|---|---|---|
| DAVITA CARTER, a minor, by DAVID and SHEENA CARTER, | ) | |
| Plaintiff, | ) | |
| v. | ) | Case No. 00-4036 |
| UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |

## ORDER

(Filed Jan. 16, 2002)

Before the Court is the above captioned lawsuit brought pursuant to the Federal Tort Claims Act seeking recovery for the personal injuries of David Carter. On March 13, 2001, the Court granted partial summary judgment in favor of Plaintiff as to liability. Commencing on December 17, 2001, the Court conducted a bench trial to determine the amount of damages.

In consideration of the evidence adduced at the trial and the arguments and legal memoranda of the parties, the Court has made certain Findings of Fact and Conclusions of Law, hereinafter set forth. In deciding this case, the Court has had to determine the credibility of the various witnesses and the Findings of Fact reflect this weighing process with reference to any material fact in dispute.

Based upon the factual record before the Court and the Court's determination of the credibility of the various witnesses the Court makes the following Findings of Fact and Conclusions of Law:

## I. FINDINGS OF FACT

The Court finds that:

### A. Background

1. Davita Carter is an African-American female born on May 14, 1986. Prior to her surgery she was in good health; except she had a scoliotic condition which could be life threatening if not corrected. According to mortality tables, notwithstanding this medical prognostication, she has a life expectancy at the time of trial of approximately 60.3 more years.

2. On or about July 7, 1997, eleven year-old Davita Carter presented herself to National Naval Medical Center in Bethesda, Maryland, operated by Defendant United States of America, and came under the care and treatment of Drs. Schrantz and Hollingsworth and others, who were likewise hospital staff members and employees of Defendant.

3. On July 7, 1997, Davita Carter, while under the care and treatment of Dr. William F. Shrantz and Dr. Kenneth E. Hollingsworth underwent spinal fusion surgery, which included the placement of rods attached to her spinal column, to correct the curvature of her spine.

4. Davita Carter was rendered paraplegic during her surgery, apparently as a result of an infarction to

her spinal cord resulting in loss of spinal cord functions at the T4 level.

5. On March 13, 2001, for all the reasons set forth in the Court's Order, this Court entered judgment against Defendant United States of America and in favor of Plaintiff Davita Carter on the issue of liability. The Court incorporates by reference all findings of fact set forth in its March 13, 2001 Order, including the findings of negligence and causation.

**B. Past Medical Expenses and Non-Economic Damages**

6. Davita Carter was an inpatient at various facilities receiving medical care and treatment as a result of her paraplegia from July 7, 1997 until September 11, 1997.

7. During her postoperative period, Davita Carter experienced pain and discomfort but not more than would be expected from spinal surgery. Davita had some complications including an infected catheter, high temperatures for a while, she underwent bone grafts incident to the therapeutic removal of the rods and fusing of her spine, she had some pulmonary problems and she experienced a blood clot in her leg. These developments complicated her acute management and caused some pain and discomfort but did not have any real long-term effect.

8. A more significant consequence was the emotional effects of Davita Carter's paraplegia condition and the resulting depression as she struggled with the permanency of her paralysis.

9. Davita Carter is paraplegic; and her condition is expected to be permanent.

10. Davita Carter experiences pain in her shoulders, wrists and upper back from having to propel her wheelchair. Although she has muscle spasms in her legs, there is no pain directly associated with her paralysis.

11. Davita Carter will remain paralyzed and require the use of a wheelchair for the remainder of her life.

12. Davita Carter has a permanent scar in the area around her neck as a result of multiple attempts to place an intravenous line in that area but there is no showing that this was caused by Defendant's negligence.

13. As a result of Defendant's negligence and the resulting injuries and damages caused thereby, Davita Carter has required a significant amount of medical care and treatment, as well as other goods and services. The goods and services rendered to, or on behalf of, Davita Carter were medically necessary, and the resulting charges incurred by, or on behalf of, Davita Carter for such goods and services were reasonable and total $126,937.71 as stipulated by the Parties.

14. As a result of Defendant's negligence, Davita Carter has sustained non-economic damages exceeding $530,000, the maximum allowed under Maryland law, for permanent disability, disfigurement, pain, suffering, diminished capacity to enjoy life, or other non-pecuniary injuries, itemized as follows:

| | |
|---|---|
| Permanent Disability | $8,000,000 |
| Disfigurement | $2,000,000 |

| | |
|---|---|
| Physical Pain and Suffering | $500,000 |
| Mental/Emotional Pain and Suffering | $3,000,000 |
| Loss of Enjoyment of Life | $2,000,000 |

## C. Present Value Discount

15. The appropriate present value net discount rate that should be applied to Davita Carter's future losses is 1 percent.

## D. Future Medical Expenses

16. Davita Carter's current family residence is inadequate in design and space to accommodate Davita's wheelchair bound daily living. An appropriately designed and spaced family residence would cost approximately $250,000 to $300,000.

17. Davita Carter will incur the following future medical expenses as a result of Defendant's negligence totaling $1,174,501.02 lifetime:

    a. medical follow-up = $805.84 per year or $48,931.02 lifetime

    b. Physical therapy = $28,823 lifetime

    c. Occupational therapy = $13,206 lifetime

    d. rehabilitation hospitalizations = $44,019 lifetime

    e. disposable supplies (diapers, catheters, gloves, lubricant, bed pads and diaper liners) = $3,879.12 per year or $233,904.00 lifetime

    f. medications = $1,119.98 per year or $67,538.00 lifetime

g. equipment (leg straps, scrub sponge, reacher, shoe horn, shower chair, wheelchair, gloves, power wheelchair, batteries and power chair maintenance) = $4,502 per year or $265,296.00 lifetime

h. bathroom ceiling lift ($5,000 every ten years), bedroom ceiling lift ($5,000 every ten years), backup generator ($4,750 every five years) = $1,950 per year or $117,000.00 lifetime

i. Hand controlled wheelchair accessible van with Captain's chair = $46,500 with replacement every 5 years or $334,800 lifetime (assuming a 40% trade in value)

j. cell phone = $348 per year or $20,984.40 lifetime

18. Davita Carter can get in and out of bed and otherwise leave and return to her wheelchair for other purposes with the use of aids such as hoists or transfer boards. In a handicap accessible house she could probably select and put on her clothes and prepare herself at the sink.

19. Davita Carter has been accommodated at school without attendant care except during the lunch period.

20. Davita Carter has not reached her maximum level of independence and with a period of education and training and the proper equipment she can achieve greater independence with a corresponding decrease in her need for attendant care. Still, there is a need for attendant care which will increase in her later years.

21. Davita Carter's current need for attendant care is 8 hours per day at a cost of $41,328.00 per year.

22. With an appropriate wheelchair accessible residence and a year counseling and training in independent living Davita Carter should be able to live, work and play comfortably without the need for a permanent full-time (eight hour/day) attendant. After one year her need for attendant care is 28 hours per week at a cost of $20,664.00 per year until she arrives at the age of fifty.

23. Davita Carter's needs for attendant care at the age of 50 will be 12 hours per day or 84 hours per week at a cost of $61,992.00 per year.

24. The present value of Davita Carter's future medical costs, including medically necessary attendant care but not handicap accessible housing, is $2,534,525.25.

**E. Lost Earning Capacity**

25. Both before and after her surgery, Davita Carter was an excellent student and wants college education. Her school transcripts reflect her academic aptitude. Both Sheena and David Carter testified that they have always planned for Davita to attend college. Given the family history and circumstances, the probability is high that had Davita not been injured she would have eventually graduated from college.

26. Davita Carter will be required to seek employment from the wheelchair level and even as a college graduate her employment opportunities and work life expectancy will be limited to some extent and Davita will more likely than not suffer lost earnings.

27. The present value of Davita Carter's earning capacity had she not been injured is $785,790

assuming a highschool education, and $1,450,810 assuming a college education.

28. Davita Carter will more likely than not attend college and receive her degree.

29. It is more likely than not that with a college degree Davita Carter will find employment whereby her income will be approximately 70.7 percent Of what it would have been without a disability. Consequently, the present value of her lost earnings capacity is $426,538.20.

## II. FINDINGS OF LAW

Preliminarily, the Court finds, and the parties agree to the following conclusions of law:

1. This action arises under the Federal Tort Claims Act, Sections 1346(b)(1), 2401(b), 2402 and 2671 through 2680 of Title 28 of the United States Code (28 U.S.C. §§ 1346(b)(1), 2401(b), 2402, 2671-2680).

2. This Court is vested with jurisdiction pursuant to Section 1346(b) of Title 28 of the United States Code (28 U.S.C. §1402(b)).

3. Venue is proper in this case pursuant to Section 1402(b) of Title 28 of the United States Code (28 U.S.C. §1402(b)).

4. Pursuant to 28 U.S.C. §2675(a), Plaintiffs timely submitted, and on May 20, 1999 the Department of the Navy received, an administrative claim based on the allegations of Davita Carter's complaint in the amount of $28,000,000.00.

5. By November 20, 1999, the Department of the Navy had neither accepted nor rejected the claim

and, pursuant to 28 U.S.C. §2675(a), Plaintiff thereafter elected to consider the failure to act as a final denial of the claim.

6. On March 13, 2001, for all of the reasons set forth in the Court's Order, this Court entered judgment against the United States of America in favor of Davita Carter on the issue of liability. The Court incorporates by reference all conclusions of law set forth in its March 13, 2001 Order.

7. The circumstances in this action are such that, if the United States were a private person, liability would be imposed under the law of Maryland, the place where the wrongful acts or omissions occurred.

Having found same, the Court further finds that Davita Carter is entitled to damages for the injuries sustained as a result of Defendant's negligence. Accordingly, the Court finds Defendant to be liable for the damages Plaintiff has suffered. These damages include past medical expenses in the amount of $126,937.71, future medical expenses in the amount of $2,834,525.25, non-economic damages in the amount of $15,500,000, and lost earning capacity in the amount of $426,538.20.

## III. ANALYSIS

The findings in this case are relatively straight forward and largely undisputed and, for the most part, need no explanation. However, the Court will touch upon how it arrived at the damages award.

**A. Medical Expenses**

The Parties have stipulated as to the value of past medical expenses. As to future medical expenses, the majority of these expenses are also undisputed. The main issues of contention are: (1) attendant care and (2) the amount that should be awarded for handicap accessible housing. In her current residence, Davita cannot perform many essential tasks necessary for daily living. The evidence suggests this is largely a result of her current living arrangements. In a handicap accessible house, and with training on how to use the features available in such a home, Davita Carter should be able to perform most, if not all, of the tasks necessary for daily living. The testimony of Steve Fry indicates that an appropriate handicap accessible home for Davita Carter would cost between $150,000 and $300,000 depending on lot, location, layout, desired features and finish. The Court has awarded the maximum amount supported by Mr. Fry's testimony. The Court finds this is the appropriate amount considering the needs of Davita Carter and the unique requirements of such construction. Furthermore, the Court recognizes there are many feature that can be added to a new home to make it more accessible and accommodating for people with paraplegia. These features are essential for Davita since without them she will not be able to be independent. On the other hand, with these features, Davita's reliance on other people to assist her in daily life activities will be greatly reduced.

This leads to the issue of attendant care. The Court has no doubt, that in her present living arrangement, Davita Carter needs eight hours per day attendant care. However, the evidence does not support a finding that this need will continue after Davita acquires suitable handicap

accessible housing. To the contrary, the evidence suggests that with the appropriate equipment and training Davita can do most daily activities without assistance. However, there are a few tasks with which Davita may always need assistance. These tasks include maneuvering through environments that are not handicap accessible such as the school lunch room. The evidence also suggests that Davita may periodically need extra help cleaning herself. For these reasons the Court has allowed for one year of full-time (8 hour per day) attendant care to allow time for the acquisition or construction of appropriate housing and to allow Davita to get additional training on living independently. After this year, the Court has decreased the amount of attendant care by one-half. The Court finds that four hours a day of attendant care is sufficient for Davita to accomplish those tasks which are medically necessary and which she cannot do for herself. This assumes she has acquired suitable housing by the end of that year. Finally, the Court recognizes that as Davita ages her need for attendant care will increase. The evidence shows that as Davita ages her joints in her shoulders and arms will deteriorate from excessive use. This will likely increase Davita's dependence on others to accomplish daily living tasks. Accordingly, the Court has awarded Davita monies to pay for an attendant at the rate of 12 hours per day after the age of 50.

**B. Lost Earnings**

The testimony of Charles Linke as to what Davita Carter would have earned had she not been rendered paraplegic is undisputed. The main point of debate is Davita's current earning capacity. Davita's attorneys argue, relying on government statistics, that Davita will

not be able to obtain employment as a result of her condition and that her earning capacity is now zero. The government counters that it is more probable than not that Davita will obtain employment. While the Court agrees that Davita will be able to obtain employment in the future, the Court also finds that her future earnings will be affected by her paraplegic condition. These findings are based in part on Plaintiff's Exhibit 66, the U.S. Department of Labor's Report on Persons with Disabilities, September 1998.

As stated in Plaintiff's Exhibit 66, "only 29.5 percent of persons aged 20 to 64 years with severe disabilities participated in labor market activity" in 1994. This percentage is far below the 84.5 percent activity rate for those without disabilities. Still, the 29.5 value cannot be viewed in isolation. As the report indicates, "[p]ersons with severe disabilities tend to be older, on average, . . . [and] older people are less likely to be active in the labor market than are younger ones." Furthermore, the definition of "severe disability" encompasses many individuals who have conditions that are more limiting, as far as employment is concerned, than Davita's condition of paraplegia. For example, the definition would encompass individuals with mental retardation, other developmental disabilities, or Alzheimer's disease. Logically, education also affects a disabled individual's ability to obtain employment. For example, the labor activity statistic for women with severe disabilities and a four year college degree is 47.8 percent. Accordingly, the Labor statistics do not provide absolute answers as to what the employment prospects of a paraplegic with Davita's characteristics would be. On the other hand, the Labor Department report does indicate that

Davita's age and intellect make her employment prospects much better than the 29.5 percent average.

The Court finds that based on Davita's individual characteristics she will more likely than not be able obtain employment in the future. Davita is very intelligent as evidenced by her school records. She plans on attending college and there is no reason to believe that she will not be successful. She attends school daily with minimal assistance from others. If she desires, she will be able to drive and transport herself after she reaches legal age. While Davita's condition may limit the number of jobs she is eligible for, it should not limit her ability to obtain a job that does not require work above the wheelchair level. Furthermore, the number of jobs that would fit in this category are substantial.

Even though Davita' s employment prospects are good, the chances that she will suffer lost wages are considerable. Davita has a condition that requires frequent medical interventions. The frequency at which Davita will have to miss work because of illness or hospitalization is higher than an average persons[1]. Furthermore, Davita may not be able to work as many hours as the average person because of the increased time it takes for her to care for herself. The Labor Department statistics support this proposition. The report indicates that on average a severely disabled women makes $1,228 per month while her non-disabled counter part makes $1,737. This shows that the earning

[1] For example, several witnesses testified that Davita is at risk for developing urinary tract infections and bowel impactions as a result of her paralysis. These conditions can cause high fevers and discomfort and may result in hospitalizations.

capacity of a severely disabled women is approximately 70.7 percent of that of her non-disabled counterpart. Considering the above restrictions on Davita's work life, the Court finds that this figure is an accurate approximation of Davita's Lost earnings capacity.

### C. Damages for Non-Economic Injuries

The largest value disagreed upon by the Parties is noneconomic damages. There is no doubt that Davita has suffered immensely as a result of her injuries. Placing a dollar figure on her suffering seems impossible. Even more difficult is the prospect of having to justify such a figure, however, it must be done. Accordingly, the Court will address each category of noneconomic damages in turn.

#### 1. Permanent Disability and Disfigurement

Davita is permanently disabled and will forever be perceived as such. It is undisputed that she is entitled to damages for this injury. Defendant's values of $300,000 for disability and $200,000 for disfigurement seem low considering the limitations that have been placed on Davita by her injury. The Court finds that Plaintiff's figures of $8 million dollars for disability and $2 million dollars for disfigurement more accurately reflect the damages suffered by Davita for incurring these limitations that will be with her for a lifetime and for the damages incurred as a result of other people's perception of her condition.

#### 2. Physical Pain and Suffering

Again, it is undisputed that Davita has and will in the future experienced some pain as a result of her paraplegia,

however, the extent of the pain is disputed. The evidence shows that Davita has and will experience pain as a result of stress to her arms and shoulders from overuse and that she has had and may have the future discomfort from the high fevers associated with urinary tract infections and bowel impactions. Still, there is no evidence to suggest that Davita will experience physical pain as a direct result of her paraplegia. Accordingly, the Court finds that Plaintiff's valuation of $2 million dollars is excessive. On the other hand, the Court thinks Defendant's value of $250,000 is low. The Court finds that a value of $500,000 more accurately approximates Davita's damages for pain and suffering that she has and will endure as a result of her condition.

**3: Mental/Emotional Pain and Suffering and Loss of Enjoyment of Life**

Far more significant than her physical pain and suffering, Davita has suffered mental and emotional pain and a diminished capacity to enjoy her life as a result of her paraplegia. Defendant values these damages at $550,000; Plaintiff at $7 million. The Court finds a value of $5 million accurately reflects the damages sustained by Davita for mental/emotional. pain and suffering and loss of enjoyment of life. The evidence shows that Davita's condition prevents her from doing many activities that ordinary people enjoy including but not limited to: walking, running, and visiting non-handicap accessible facilities. Furthermore, while Davita is capable of having sexual intercourse or conceiving a child, she will never have the sexual response of a non-paralyzed woman. These limitations support an award of $2 millions for diminished capacity to enjoy life. Davita's awareness of

these limitations has caused her significant emotional pain which supports an award of $3 million for emotional pain and suffering.

### D. Present Value Net Discount Rate

The Court finds that the appropriate net discount rate for present value calculations in this case is 1 percent. This the "upper bound" of Dr. Linke's calculations. The Court agrees with Defendant that Dr. Linke's figure is low, however, Defendant has not produced any evidence to show that a higher discount rate should be applied. Accordingly, the Court adopts the "upper bound" net discount rate proposed by Dr. Linke of 1 percent.

## IV. CONCLUSION

IT IS THEREFORE ORDERED Plaintiff's are entitled to **eighteen million eight hundred eighty-eight thousand one dollars and sixteen cents** ($18,888,001.16). The Court will reserve entering judgment until after the post trial motions have been ruled upon.

IT IS FURTHER ORDERED that all post trial motions be filed on or before February 8, 2002. Responses to post-trial motions are due on or before February 28, 2002. In addition, the Court will allow the parties to file a reply on or before March 15, 2002.

ENTERED this 16 day of January, 2002.

/s/ Joe B. McDade
JOE BILLY McDADE
Chief United States District Judge

**Exhibit A**
**Davita Carter Damages Calculations**

| | |
|---|---|
| **Past Medical Expenses** | $126,937.71 |
| **Non-Economic (pain and suffering, personal injury, etc.)** | $15,500,000.00 |
| **Present Value of Future Medical Expenses not including handicap accesible home (including attendant care (Exhibit B)** | $2,534,525.25 |
| **Handicap Accesible Home** | $300,000.00 |
| **Present Value of Lost Earnings** | $426,538.20 |
| **Total** | $18,888,001.16 |

Exhibit P - F[illegible]re Medical Expenses
David Carter

| Year | Age | Time period for interest calculation | General Medical Care | Physiatrist | Orthopedic Surgeon | Urinalysis | Urine Culture | Complete Blood Count | Blood Chemistry | Renal Ultrasound | Extremity Xray | Blood Draw | Physical Therapy | Occupational Therapy | Rehab Hosp. Admission | Attendant Care | Batrium #20 | Cipro #20 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2002 | 16 | 0.41 | $171.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $392.00 | $180.00 | $599.00 | $33,911.61 | $28.00 | $69.00 |
| 2003 | 17 | 1.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $24,372.20 | $34.00 | $84.00 |
| 2004 | 18 | 2.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2005 | 19 | 3.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2006 | 20 | 4.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2007 | 21 | 5.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2008 | 22 | 6.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2009 | 23 | 7.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2010 | 24 | 8.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2011 | 25 | 9.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2012 | 26 | 10.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2013 | 27 | 11.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2014 | 28 | 12.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2015 | 29 | 13.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2016 | 30 | 14.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2017 | 31 | 15.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2018 | 32 | 16.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2019 | 33 | 17.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2020 | 34 | 18.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2021 | 35 | 19.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2022 | 36 | 20.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2023 | 37 | 21.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2024 | 38 | 22.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2025 | 39 | 23.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2026 | 40 | 24.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2027 | 41 | 25.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2028 | 42 | 26.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2029 | 43 | 27.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2030 | 44 | 28.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2031 | 45 | 29.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2032 | 46 | 30.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2033 | 47 | 31.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2034 | 48 | 32.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2035 | 49 | 33.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $20,664.00 | $34.00 | $84.00 |
| 2036 | 50 | 34.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $46,700.64 | $34.00 | $84.00 |
| 2037 | 51 | 35.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2038 | 52 | 36.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2039 | 53 | 37.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2040 | 54 | 38.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2041 | 55 | 39.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2042 | 56 | 40.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2043 | 57 | 41.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2044 | 58 | 42.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2045 | 59 | 43.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2046 | 60 | 44.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2047 | 61 | 45.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2048 | 62 | 46.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2049 | 63 | 47.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2050 | 64 | 48.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2051 | 65 | 49.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2052 | 66 | 50.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2053 | 67 | 51.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2054 | 68 | 52.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2055 | 69 | 53.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2056 | 70 | 54.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2057 | 71 | 55.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2058 | 72 | 56.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2059 | 73 | 57.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2060 | 74 | 58.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | $147.97 | $66.70 | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2061 | 75 | 59.41 | $228.00 | $120.00 | $120.00 | $26.50 | $100.00 | $57.00 | $27.00 | | | $20.00 | $478.00 | $219.00 | $730.00 | $61,992.00 | $34.00 | $84.00 |
| 2062 | 76 | 59.89 | $114.00 | $60.00 | $120.00 | $13.25 | $50.00 | $29.00 | $27.00 | $147.97 | $66.70 | $10.00 | $229.00 | $105.00 | $350.00 | $29,716.96 | $18.00 | $40.00 |
| Total | | | $13,737.00 | $7,260.00 | $7,320.00 | $1,603.25 | $6,050.00 | $3,449.00 | $1,647.00 | $4,587.07 | $2,067.70 | $1,210.00 | $28,823.00 | $13,206.00 | $44,019.00 | $2,345,751.40 | $2,052.00 | $5,065.00 |

**Exhibit B -- Future Medical Expenses**
Davita Carter

| Year | Age | Time period for interest calculation | Diapers | Catheters | Gloves | Lubricant | Bed Pans | Diaper Liners | Baclofen 10 mg | Suppositories | Ditropan | Bathroom Ceiling Lift | Bedroom Ceiling Lift | Backup Generator | Wheelchair Accessible Van |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2002 | 16 | 0.41 | $708.00 | $1,771.00 | $197.00 | $52.00 | $218.00 | $234.00 | $422.00 | $65.00 | $335.00 | $5,000.00 | $5,000.00 | $4,750.00 | $46,500.00 |
| 2003 | 17 | 1.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2004 | 18 | 2.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2005 | 19 | 3.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2006 | 20 | 4.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2007 | 21 | 5.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | $4,750.00 | $27,900.00 |
| 2008 | 22 | 6.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2009 | 23 | 7.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2010 | 24 | 8.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2011 | 25 | 9.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2012 | 26 | 10.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | $5,000.00 | $5,000.00 | $4,750.00 | $27,900.00 |
| 2013 | 27 | 11.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2014 | 28 | 12.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2015 | 29 | 13.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2016 | 30 | 14.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2017 | 31 | 15.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | $4,750.00 | $27,900.00 |
| 2018 | 32 | 16.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2019 | 33 | 17.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2020 | 34 | 18.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2021 | 35 | 19.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2022 | 36 | 20.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | $5,000.00 | $5,000.00 | $4,750.00 | $27,900.00 |
| 2023 | 37 | 21.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2024 | 38 | 22.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2025 | 39 | 23.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2026 | 40 | 24.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2027 | 41 | 25.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | $4,750.00 | $27,900.00 |
| 2028 | 42 | 26.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2029 | 43 | 27.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2030 | 44 | 28.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2031 | 45 | 29.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2032 | 46 | 30.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | $5,000.00 | $5,000.00 | $4,750.00 | $27,900.00 |
| 2033 | 47 | 31.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2034 | 48 | 32.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2035 | 49 | 33.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2036 | 50 | 34.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2037 | 51 | 35.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | $4,750.00 | $27,900.00 |
| 2038 | 52 | 36.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2039 | 53 | 37.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2040 | 54 | 38.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2041 | 55 | 39.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2042 | 56 | 40.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | $5,000.00 | $5,000.00 | $4,750.00 | $27,900.00 |
| 2043 | 57 | 41.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2044 | 58 | 42.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2045 | 59 | 43.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2046 | 60 | 44.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2047 | 61 | 45.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | $4,750.00 | $27,900.00 |
| 2048 | 62 | 46.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2049 | 63 | 47.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2050 | 64 | 48.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2051 | 65 | 49.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2052 | 66 | 50.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | $5,000.00 | $5,000.00 | $4,750.00 | $27,900.00 |
| 2053 | 67 | 51.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2054 | 68 | 52.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2055 | 69 | 53.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2056 | 70 | 54.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2057 | 71 | 55.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | $4,750.00 | $27,900.00 |
| 2058 | 72 | 56.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2059 | 73 | 57.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2060 | 74 | 58.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2061 | 75 | 59.41 | $864.00 | $2,160.00 | $240.00 | $64.00 | $266.00 | $285.00 | $515.00 | $79.00 | $408.00 | | | | |
| 2062 | 76 | 59.89 | $415.00 | $1,037.00 | $115.00 | $31.00 | $128.00 | $137.00 | $247.00 | $38.00 | $196.00 | | | | ($18,600.00) |
| Total | | | $52,099.00 | $130,248.00 | $14,472.00 | $3,859.00 | $16,040.00 | $17,186.00 | $31,054.00 | $4,764.00 | $24,603.00 | $30,000.00 | $30,000.00 | $57,000.00 | $334,800.00 |

Exhibit B - Future Medical Expenses
Davita Carter

| Year | Age | Time period for interest calculation | Cellular Phone | leg straps | Scrub Sponge | Reacher | Shoehorn | Shower Chair | Wheelchair | Hospital Bed | Sliding Board | Wheelchair Cushion | Wheelchair Maintenance | Wheelchair gloves | Power Wheelchair | Batteries | Power Chair Maintenance | Value in 2001 dollars | Present Value |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2002 | 16 | 0.41 | $285.00 | $90.00 | $18.00 | $21.00 | $0.00 | $980.00 | $3,412.00 | $2,130.00 | $35.00 | $575.00 | $200.00 | $25.00 | $4,995.00 | $160.00 | $300.00 | $114,522.78 | $114,056.52 |
| 2003 | 17 | 1.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $32,713.70 | $32,257.93 |
| 2004 | 18 | 2.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $29,220.17 | $28,527.80 |
| 2005 | 19 | 3.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $38,967.50 | $37,667.49 |
| 2006 | 20 | 4.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | $25.00 | | $160.00 | $300.00 | $29,245.17 | $27,989.61 |
| 2007 | 21 | 5.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $61,655.50 | $58,424.26 |
| 2008 | 22 | 6.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $39,182.17 | $36,761.10 |
| 2009 | 23 | 7.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $29,005.50 | $26,943.81 |
| 2010 | 24 | 8.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | $25.00 | | $160.00 | $300.00 | $29,245.17 | $26,897.47 |
| 2011 | 25 | 9.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $38,967.50 | $35,484.48 |
| 2012 | 26 | 10.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | $2,130.00 | $35.00 | | $200.00 | | | $160.00 | $300.00 | $74,000.17 | $66,718.64 |
| 2013 | 27 | 11.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $29,005.50 | $25,892.47 |
| 2014 | 28 | 12.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | $25.00 | $4,995.00 | $160.00 | $300.00 | $39,207.17 | $34,652.71 |
| 2015 | 29 | 13.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $29,005.50 | $25,382.29 |
| 2016 | 30 | 14.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $29,220.17 | $25,316.97 |
| 2017 | 31 | 15.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $71,617.50 | $61,436.55 |
| 2018 | 32 | 16.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | $25.00 | | $160.00 | $300.00 | $29,245.17 | $24,839.36 |
| 2019 | 33 | 17.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $29,005.50 | $24,391.88 |
| 2020 | 34 | 18.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $39,182.17 | $32,623.61 |
| 2021 | 35 | 19.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $29,005.50 | $23,911.26 |
| 2022 | 36 | 20.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | $2,130.00 | $35.00 | | $200.00 | $25.00 | | $160.00 | $300.00 | $74,025.17 | $60,419.92 |
| 2023 | 37 | 21.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $38,967.50 | $31,490.67 |
| 2024 | 38 | 22.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $29,220.17 | $23,379.80 |
| 2025 | 39 | 23.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $29,005.50 | $22,978.25 |
| 2026 | 40 | 24.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | $25.00 | $4,995.00 | $160.00 | $300.00 | $39,207.17 | $30,752.52 |
| 2027 | 41 | 25.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $61,655.50 | $47,881.26 |
| 2028 | 42 | 26.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $29,220.17 | $22,467.53 |
| 2029 | 43 | 27.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $38,967.50 | $29,665.64 |
| 2030 | 44 | 28.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | $25.00 | | $160.00 | $300.00 | $29,245.17 | $22,043.67 |
| 2031 | 45 | 29.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $29,005.50 | $21,646.55 |
| 2032 | 46 | 30.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | $2,130.00 | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $83,962.17 | $62,039.84 |
| 2033 | 47 | 31.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $29,005.50 | $21,220.03 |
| 2034 | 48 | 32.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | $25.00 | | $160.00 | $300.00 | $29,245.17 | $21,183.53 |
| 2035 | 49 | 33.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $38,967.50 | $27,946.37 |
| 2036 | 50 | 34.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $55,256.81 | $39,236.24 |
| 2037 | 51 | 35.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $102,983.50 | $72,401.54 |
| 2038 | 52 | 36.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | $25.00 | $4,995.00 | $160.00 | $300.00 | $80,535.17 | $56,058.87 |
| 2039 | 53 | 37.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $70,333.50 | $48,472.97 |
| 2040 | 54 | 38.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $70,548.17 | $48,139.52 |
| 2041 | 55 | 39.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $80,295.50 | $54,248.27 |
| 2042 | 56 | 40.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | $2,130.00 | $35.00 | | $200.00 | $25.00 | | $160.00 | $300.00 | $115,353.17 | $77,161.88 |
| 2043 | 57 | 41.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $70,333.50 | $46,581.57 |
| 2044 | 58 | 42.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $80,510.17 | $52,793.60 |
| 2045 | 59 | 43.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $70,333.50 | $45,663.73 |
| 2046 | 60 | 44.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | $25.00 | | $160.00 | $300.00 | $70,573.17 | $45,365.68 |
| 2047 | 61 | 45.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $112,945.50 | $71,884.52 |
| 2048 | 62 | 46.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $70,548.17 | $44,456.04 |
| 2049 | 63 | 47.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $70,333.50 | $43,881.95 |
| 2050 | 64 | 48.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | $25.00 | $4,995.00 | $160.00 | $300.00 | $80,535.17 | $49,749.40 |
| 2051 | 65 | 49.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $70,333.50 | $43,017.30 |
| 2052 | 66 | 50.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | $2,130.00 | $35.00 | | $200.00 | | | $160.00 | $300.00 | $115,328.17 | $69,838.51 |
| 2053 | 67 | 51.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $80,295.50 | $48,142.58 |
| 2054 | 68 | 52.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | $25.00 | | $160.00 | $300.00 | $70,573.17 | $41,894.44 |
| 2055 | 69 | 53.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $70,333.50 | $41,338.78 |
| 2056 | 70 | 54.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $80,510.17 | $46,851.64 |
| 2057 | 71 | 55.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $102,983.50 | $59,336.28 |
| 2058 | 72 | 56.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | $25.00 | | $160.00 | $300.00 | $70,573.17 | $40,259.74 |
| 2059 | 73 | 57.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | $980.00 | $3,412.00 | | $35.00 | $575.00 | $200.00 | | $4,995.00 | $160.00 | $300.00 | $80,295.50 | $45,352.49 |
| 2060 | 74 | 58.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $70,548.17 | $39,452.48 |
| 2061 | 75 | 59.41 | $348.00 | $120.00 | $24.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $70,333.50 | $38,943.00 |
| 2062 | 76 | 59.89 | $167.00 | $60.00 | $12.00 | $21.00 | $9.00 | | | | $35.00 | | $200.00 | | | $160.00 | $300.00 | $15,806.88 | $8,710.42 |
| Total | | | $20,984.00 | $7,230.00 | $1,446.00 | $1,281.00 | $549.00 | $19,600.00 | $68,240.00 | $12,780.00 | $2,135.00 | $11,500.00 | $12,200.00 | $375.00 | $99,900.00 | $9,760.00 | $18,300.00 | $3,520,252.42 | $2,534,525.25 |